STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of ISAIAH JEREMIAH BEARDEN, Minor.

DEPARTMENT OF HUMAN SERVICES, f/k/a FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

PATTY JO GREEN and RUNDAL BEARDEN,

Respondents-Appellants.

UNPUBLISHED
October 20, 2005

No. 261814
Oakland Circuit Court
Family Division
LC No. 04-700161-NA

Before: Cavanagh, P.J., and Smolenski and Zahra, JJ.

PER CURIAM.

Respondents appeal as of right from the trial court order terminating their parental rights to the minor child under MCL 712A.19b(3)(b)(i), (b)(ii), (i), (j), and (l). We affirm.

Respondents first became involved with petitioner in 2002 after their newborn child, Malik, died of suffocation while sleeping with respondents, both of whom had been ingesting cocaine and alcohol. Respondents were offered a treatment plan directed toward reunification with their two remaining children, Rundal Jr. and Jason, but they failed to complete any part of that agreement, except for belatedly participating in psychological evaluations, and their parental rights to the children were terminated in November 2003. In April of 2003, respondents had another child, Odel, who tested positive for cocaine at birth. Respondents' parental rights to Odel were also terminated. The minor child in the present case, Isaiah, was removed from respondents' care shortly after his birth in October 2004, and petitioner sought termination of the parental rights of both respondents in its initial petition. Following a two-day trial, the trial court found grounds for jurisdiction over the child were established by a preponderance of the evidence, MCL 712A.2(b), and that various statutory grounds for termination were established by clear and convincing evidence. MCL 712A.19b(3). Following a separate best interests hearing, the trial court found that termination of respondents' parental rights was not contrary to the best interests of the child, MCL 712A.19b(5), and entered an order terminating their parental rights.

Respondent father challenges the court's exercise of jurisdiction over the minor child. In order to acquire jurisdiction over a minor, the trier of fact must determine by a preponderance of

the evidence that the child comes within the statutory terms set forth in MCL 712A.2(b). *In re SR*, 229 Mich App 310, 314; 581 NW2d 291 (1998). Respondent father contends that jurisdiction could not be taken of the child with respect to respondent father because he was not a parent or custodian of the child under MCL 712A.2(b) at the time that any of the acts giving rise to jurisdiction occurred. However, respondent father was the legal parent of the child when the amended petition was filed on December 3, 2004, and when jurisdiction was taken on March 9, 2005. Even if respondent father had not established paternity by the time jurisdiction was taken, this would not invalidate the court's taking of jurisdiction or its subsequent termination of his parental rights, because jurisdiction is tied to the child. *In re CR*, 250 Mich App 185, 205; 646 NW2d 506 (2002). Finally, as a factual matter, the trial court did not clearly err by finding at least one of the jurisdictional bases set forth in MCL 712A.2(b) established by a preponderance of the evidence. The evidence at trial indicated that alcohol and cocaine use by both respondents was involved in the suffocation death of Malik. Because respondents' neglect of Malik is evidence of how they would treat other children, *In re AH*, 245 Mich App 77, 84; 627 NW2d 33 (2001), the trial court was warranted in finding that their home was unfit by reason of neglect. MCL 712A.2(b)(2); see also *In re Gazella*, 264 Mich App 668, 680-681; 692 NW2d 708 (2005) (noting that a child may come under court jurisdiction solely on the basis of the parents' treatment of another child). The failure of respondent mother to complete substance abuse treatment and the evidence that respondent father continued to abuse alcohol as recently as February 2004 also support the trial court's conclusion that the home was unfit. MCL 712A.2(b)(2). The trial court did not clearly err by finding that jurisdiction was established by a preponderance of the evidence. *In re SR, supra* at 314-315.

Respondents also challenge the sufficiency of the evidence to establish a statutory ground for the termination of their parental rights. The trial court did not clearly err in finding that the statutory grounds for termination were established by clear and convincing evidence. MCR 3.977(J); *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). It is reasonable to infer that the suffocation death of Malik was a result of the parents' drug and alcohol intoxication. The parents admitted cocaine and alcohol use on that occasion and the hotel room in which they were staying was strewn with alcohol containers and drug paraphernalia. This evidence is sufficient to establish that each respondent either caused the death of the minor child's sibling or, having the opportunity to prevent it, failed to do so.[1] Furthermore, neither respondent successfully addressed their substance abuse problems. Respondent mother testified that she had never completed a substance abuse treatment program, although she was referred to at least two during the proceedings concerning her other children. Respondent father's continued abuse of alcohol is reflected in his February 2004 charge and subsequent conviction for driving under the influence, second offense. The evidence also indicated that there have been domestic violence problems between respondents, and neither attended anger management classes. Under these circumstances, it was not clear error for the trial court to find a reasonable likelihood that the

[1] Respondent father, citing *In re AH*, 245 Mich App 77; 627 NW2d 33 (2001), contends that petitioner failed to establish the necessary "risk of harm" as required by MCL 722.638. We disagree. Although MCL 722.638 does not expressly indicate the procedural step at which "risk

concerning Malik's death.

child would be injured or abused if returned to respondents. Furthermore, there is no dispute that the parental rights of respondents to three other children were terminated. Evidence of unsuccessful rehabilitation efforts is found in respondents' failure to complete their parent-agency agreements in the matter concerning their older children.

The trial court also did not clearly err by finding that termination of respondents' parental rights was not clearly contrary to the best interests of the child. MCL 712A.19b(5). The child was removed from respondents' care upon release from the hospital after his birth and, therefore, is not bonded with them. Neither parent completed substance abuse treatment. The record offered no evidence to support a conclusion that termination of respondents' parental rights would be contrary to the best interests of the child.

Respondent father further claims he was denied his right to due process by the trial court's evidentiary and procedural errors. We are not persuaded that respondent father was denied due process when the trial court allowed petitioner to waive opening statement.[2] Given the existence of a factually specific petition that notified respondent father of the grounds upon which termination was sought, it does not appear that the lack of opening statement deprived him of notice of the case against him or otherwise increased the chance of an erroneous deprivation of respondent father's liberty interest in the care and custody of his child.

We also find no denial of due process in the trial court's admission of medical records containing a nurse's conclusion that respondent father was intoxicated while at the hospital with the minor child. Medical records kept in the regular course of business by a hospital are admissible under MRE 803(6). *Merrow v Bofferding*, 458 Mich 617, 626-627; 581 NW2d 696 (1998). Respondent father argues that the statement that he had been drinking is an opinion and, therefore, inadmissible under the business records exception. *People v Shipp*, 175 Mich App 332, 338; 437 NW2d 385 (1989). The trial court in this case noted that the document in question reflected the nurse's observation of respondent father's loud voice and his smelling of intoxicants as well as her conclusion that he was intoxicated. We conclude that the nurse's direct observations were admissible under MRE 803(6), *Merrow*, *supra* at 626-627, but her conclusion that respondent was intoxicated was not. *Shipp, supra* at 338. However, any error in this regard did not deprive respondent father of due process, as the trial court could properly consider the nurse's observations and draw its own conclusion that respondent father was intoxicated. Further, because jurisdiction over the child and termination of respondent father's parental rights were clearly warranted even without this evidence, there appears no likelihood that the admission of improper hearsay evidence increased the likelihood that respondent father would be erroneously deprived of his liberty interest in the care of his child.

Respondent father next asserts denial of due process by petitioner's untimely production of materials required by a discovery order. In particular, respondent father argues that if the documents had been timely produced, he would have determined that the medical records

[2] Under MCR 2.507(A), the consent of the opposing party is required before opening statements may be waived. However, that provision does not apply to juvenile proceedings. MCR 3.901(A)(2).

contained a notation that respondent father was intoxicated while in the hospital with the minor child and would have objected to this notation as inadmissible. However, because the same document contained admissible direct observations allowing the court to draw an independent conclusion, MRE 803(6); *Merrow*, *supra* at 626-627, the error was harmless.

Finally, respondent father claims that he was denied due process by the trial court's denial of an adjournment to secure his presence at the adjudication. Respondent father was represented by counsel at the adjudication and termination hearings. Furthermore, the evidence did not present a close case. MCR 3.972(B)(1) provides that "[t]he respondent has the right to be present, but the court may proceed in the absence of the respondent provided notice has been served on the respondent." Respondent has not argued on appeal that proper notice was not given. Moreover, it should be noted that respondent father did appear and testify in the best interests phase of the proceedings. We, therefore, conclude that respondent father was not denied procedural due process by the trial court's refusal to grant an adjournment when respondent did not appear for the adjudication and termination trial.

Respondent mother asserts on appeal that the trial court erred by taking judicial notice of the previous case involving the other children of respondents. Judicial notice may be taken of facts "(1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." MRE 201(b). Therefore, the trial court did not err by taking judicial notice of the previous court case involving respondents. Respondent mother's challenges to the reliability of the court file do not alter this result. The trial court in this matter stated that it would take judicial notice of legal documents submitted and court orders in the previous matter. However, the court also received testimony from foster care worker Alicia Chapman concerning the reason for initiating the previous case, the requirements of the parent-agency agreements in that matter, and the failure of respondent mother to complete her parent-agency agreement. Respondent mother herself supplied testimony that she has a ten-year history of cocaine use, that Malik died of suffocation at twenty-eight days of age while sleeping with respondents after they used cocaine and alcohol, that Odel tested positive for cocaine at birth, and that she has never completed substance abuse treatment. As respondent mother concedes on appeal, there is no dispute that a prior termination occurred. We find no error warranting reversal in the trial court's taking of judicial notice.

Finally, respondent mother asserts that the trial court should have dismissed the case because of the nonappearance of the petitioning social worker, Ms. Barrera. However, the trial court was never asked to dismiss the case on this ground and, on appeal, respondent mother has cited no authority in support of the argument that such action should have been taken. Therefore, this argument has been waived on appeal. *Grand Valley Health Center v Amerisure Ins Co,* 262 Mich App 10, 22; 684 NW2d 391 (2004). Even if this were error, there appears no likelihood that the error affected the outcome, because the evidence was clearly sufficient, even absent

testimony from the worker assigned to the current case, to warrant termination of respondent mother's parental rights.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Michael R. Smolenski
/s/ Brian K. Zahra